No. 94-590

Supreme Court, U.S.
FILED
JAN 12 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE, INC., ALBANY FREE FROM DRUG ABUSE, AND DRUG WATCH OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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January 12, 1995

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with over 100,000 supporters nationwide whose interests WLF represents. WLF engages in litigation and participates in administrative proceedings in a variety of areas and devotes a substantial amount of its resources to supporting the Nation's campaign against drug abuse. To that end, WLF

has appeared as an *amicus curiae* before federal and state courts nationwide in cases involving drug testing. *See, e.g.*, *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991); *Loder v. City of Glendale*, 34 Cal. Rptr. 2d 94 (Cal. App. 2 Dist. 1994).

Parents' Association to Neutralize Drug & Alcohol Abuse, Inc. (PANDAA) is a national non-profit organization dedicated to curtailing illegal drug use, especially by our Nation's youth. PANDAA was founded in 1980 by parents concerned about teenage alcohol and drug abuse. PANDAA believes schools have an obligation to the community and the families they serve to provide an alcohol- and drug-free learning environment for students. PANDAA supports drug education in schools and strictly enforced consequences for violations, in light of the effects of peer pressure and drug-using role models in exacerbating the drug abuse problem.

Albany Free From Drug Abuse (AFFDA) is a non-profit organization based in Albany, Oregon that assists families affected by substance abuse, assists in placement for treatment, and provides support following treatment.

Drug Watch Oregon, an affiliate of Drug Watch International, seeks to reduce demand for psychoactive and addictive substances in the state by providing Oregonians with scientifically documented information about the physiological, social, and economic damage that such substances cause. Serving as an information resource center on a wide range of drug-related topics, Drug Watch Oregon produces pamphlets, books, newsletters, video and

audio tapes and conducts presentations and workshops on drug abuse issues.

Amici submit this brief in support of Petitioner with the written consent of both parties. Letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case involves the constitutionality of a drug testing program for student athletes in a small school district in Oregon, but its significance is much broader. After a decade of hard-won success in reducing the prevalence of drug use in our society, we have become complacent and now are poised on the brink of a new disaster. Over the past two years, drug use by high school seniors has increased by one-third; among eighth graders the rate of increase is even greater. At this critical juncture, we cannot afford to renounce one of the most effective techniques for preventing drug use.

Drug testing works. In our armed services, it has virtually eliminated a formerly rampant and debilitating drug problem. Most large private-sector employers now use drug testing, and the percentage of employees testing positive has declined substantially each year. Drug testing laboratories licensed by the U.S. Department of Health and Human Services conduct millions of urinalysis tests each year with a high degree of accuracy and reliability.

The major barrier to greater use of drug testing is legal uncertainty. This Court's decisions in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989), have been read in a grudging manner by many

lower courts, including the court below, to hold that public-sector drug testing can be constitutional only if undertaken to prevent horrible disasters such as train wrecks or nuclear power plant explosions. Even criminal prosecutors at the Justice Department cannot be subjected to random drug testing unless they prosecute drug cases specifically or have access to Top Secret classified information.[1]

Even more debilitating than the actual holdings of the cases below has been the burden of litigation. Each government agency's testing program for each category of employees has been potentially subject to lawsuits all across the country, with judges performing a detailed weighing of the evidence bearing on the reasonableness of each aspect of the program. Even now, eight years after its promulgation, the drug testing requirements of President Reagan's Executive Order 12,564 have yet to be fully implemented by all government agencies. It is not surprising that school districts and local governments have been even less likely to implement drug testing programs and undertake the inevitable burden of litigation, not to mention the risk of damages and attorneys fees under 42 U.S.C. §§ 1983 and 1988.

This Court should adopt a clear holding that administrative drug testing programs are presumptively reasonable, and thus constitutional, so long as the government has a legitimate interest in preventing drug use among participants in a particular program or activity. The governmental interest should not have to be so dramatic as

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[1] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

the prevention of a nuclear disaster, but should also extend to the integrity and efficiency of its work force or the health and safety of children entrusted to its care. Under such circumstances, the Fourth Amendment should require only that the criteria for testing be neutral and nondiscriminatory, with reasonable safeguards to protect the privacy of those being tested.

If the lower courts are authorized to evaluate the constitutionality of programs such as this one under a totality-of-the-circumstances balancing test, then there will be no stability in the law. Even if the Vernonia testing is sustained, other programs will be discouraged by the threat of litigation and the fear of judicial hostility.

This should not be a difficult or close case. It is hard to imagine a more compelling societal interest than preventing middle and high school students from using illegal drugs. The school district has a particularly strong interest in the health and fitness of students who participate in competitive athletics. Athletes are traditionally subject to a number of requirements that diminish the sense in which a drug test would violate their expectation of privacy. Indeed, it is common for students to be required to take a physical examination, often including urinalysis, as a condition of being allowed to participate in competitive sports. If students can be required to produce urine specimens to be tested for glucose, surely the specimens can also be tested for amphetamines or cocaine.

ARGUMENT

I. This Search Should Be Judged on a General Standard of Reasonableness

This Court has applied the Fourth Amendment outside the context of law enforcement, but with a recognition that the rules and presumptions governing police activity are not appropriate in other settings. "Searches" are routinely conducted of persons entering courthouses or airports, or leaving libraries, without a warrant or individualized suspicion of criminal conduct. *See von Raab*, 489 U.S. at 675 n.3; *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 474 n.18 (1990) (Stevens, J., dissenting). The government can impose requirements on its employees, including the requirement to show up for work each morning, that could be characterized as "searches" or "seizures." *See O'Connor v. Ortega*, 480 U.S. 709 (1987). Similarly, this Court has recognized that the Fourth Amendment applies in a different way in the school setting, where teachers and administrators are not treated as if they were police officers. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

The Court's expansive approach to defining searches and seizures could quite logically extend to a variety of government activities not traditionally thought to implicate the Fourth Amendment. It could be said that citizens are "seized" when required to appear for jury duty or to give a deposition when not a party to a lawsuit. A pre-induction physical examination of potential draftees would appear to be a "search," as would a drill sergeant's footlocker inspection or a government doctor's examination of an unconscious patient brought to a hospital. Indeed, taxation

or the condemnation of property could readily be characterized as a "seizure."

In all of these non-police settings, the Fourth Amendment basically requires that searches and seizures be reasonable. The Court has applied a balancing test to determine the constitutionality of such intrusions, taking into account a variety of factors. In applying this test, however, the Court must be careful not to revive the judicial activism of the early Twentieth Century. A thoughtful student of the Court's Fourth Amendment jurisprudence recently observed as follows:

> To be sure, the Amendment is triggered only by a 'search' or 'seizure,' and to ignore these triggers is to rewrite the Amendment into a global command of reasonableness. Yet a great many government actions can be properly understood as 'searches' or 'seizures,' especially when we remember that a person's 'effects' may be intangible — as the landmark *Katz* case teaches us. Unlike the Due Process Clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims the need to distinguish between reasonable and unreasonable government policy. For those who believe in a 'substantive due process' approach to the Constitution, the Fourth Amendment thus seems a far more plausible textual base than the Due Process Clause itself. For those who

> believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the Equal Protection Clause.

Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 811 (1994) (footnotes omitted).

In view of the potential scope of Fourth Amendment reasonableness review, the Court should be careful to emphasize that judges are not entitled to substitute their own views for those of legislative or executive officials on the wisdom of any government policy that can be characterized as a "search" or "seizure." *See Sitz*, 496 U.S. at 453-54 (choice among reasonable alternatives should be made by politically accountable officials, not by courts).

The Court has also recognized that multi-factor balancing tests are difficult to apply consistently and often generate confusion and needless litigation. *See Solorio v. United States*, 483 U.S. 435, 448-50 (1987); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). Fourth Amendment reasonableness review is particularly subject to capricious application. Recently, for example, a panel of the Ninth Circuit conducted a detailed weighing of the facts and circumstances before concluding that a lawyer's Fourth Amendment rights were violated when his shoes set off a courthouse metal detector and he was compelled to remove them and walk through the detector in stocking feet. *Klarfeld v. United States*, 944 F.2d 583 (9th Cir. 1991), *reh'g en banc denied*, 962 F.2d 866 (9th Cir. 1992) (Kozinski, J. and ten other judges dissenting).

This Court's decision in *von Raab* has similarly been interpreted (and we think misinterpreted) to require any government entity seeking to implement a drug testing program for employees to defend every aspect of its program in fact-intensive litigation, with considerable variations in outcome depending inordinately upon the skill of the lawyers and identity of the judges assigned. The opinion below canvassed a number of these decisions and concluded that the government could require drug testing only to combat "extreme dangers and hazards" such as "an airplane or train wreck, or a gas pipeline or nuclear power plant disaster." *Acton v. Vernonia School District 47J*, 23 F.3d at 1514, 1526 (9th Cir. 1994).[2] As a consequence of this sort of judicial reasoning, public-sector drug testing has been discouraged in circumstances that do not happen to coincide factually with *Skinner* and *von Raab*. Perversely, it is much easier for drug users now to obtain jobs as teachers or government regulators than as employees of most major corporations in the private sector.

In summary, the characterization of this drug-testing program as a "search" should not necessarily suggest that it is disfavored or subject to intensive case-by-case judicial scrutiny. The Court should adopt a clear and categorical rule that drug testing programs of this nature are reasonable and thus constitutional.

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[2] By contrast, the Seventh Circuit has upheld a random drug testing program for jockeys and other horse race personnel where the government interest would seem considerably less critical, although no doubt legitimate. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (*en banc*).

II. Schools Have a Compelling Interest in Preventing Drug Use by Students in General, and by Athletes in Particular

The tragic consequences of adolescent drug use are apparent and should not require extended discussion.[3] Youthful bodies and minds are more vulnerable than those of adults to the adverse effects of drugs. Addiction is more likely to result when drug use begins at an early age. Drug use is strongly related to various kinds of risky behavior that can result in automobile collisions, other violent injuries, and sexually transmitted diseases (including the human immunodeficiency virus, which can also be transmitted through the sharing of hypodermic needles). Students must necessarily come into contact with a criminal element in order to obtain drugs and may themselves engage in drug dealing or other criminal activity to finance drug purchases. Drug-using students have inferior academic performance and are more likely to drop out of school. In short, it is hard to imagine a school district having a more compelling interest than the prevention of drug use among its students.

Drug use remains all too common among adolescents. Although substantial reductions in the prevalence of drug use occurred during the 1980's,[4] there is powerful evidence

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[3] *See generally*, Yifrah Kaminer, *Adolescent Substance Abuse*, *in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) (articles in this textbook are hereinafter cited to "Galanter & Kleber"), at 415-37 and references cited therein.

[4] The total number of current illegal drug users in the U.S. population declined from 24.3 million in 1979 to 11.4 million in 1992. (continued...)

of a recent reversal of this trend among young people. Annual surveys of a national sample of high school seniors have been conducted by the Institute for Social Research at the University of Michigan since 1975, with funding from the National Institute on Drug Abuse of the U.S. Department of Health and Human Services. Since 1991, this survey has also included a cross-section of eighth and tenth grade students.[5] The most recent results of this survey show a substantial increase in adolescent drug use over the past two years:

- The prevalence of past-year illicit drug use by high school seniors peaked at 54.2 percent in 1979, steadily declined until it bottomed out at 27.1 percent in 1992, and has rebounded since then to 35.8 percent in 1994. This is an increase of nearly one-third in only two years.[6]

- Even more disturbing is the trend among younger students. Use of marijuana among eighth graders more than doubled between 1991 and 1994, from 6.2 to 13.0 percent.

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[4] (...continued)
The White House, National Drug Control Strategy, *National Household Survey on Drug Abuse* (Feb. 1994), at 100.

[5] This survey was formerly known as the National High School Senior Survey, and is now called the Monitoring the Future Study. A copy of a synopsis of the study results, as released by the Department of Health and Human Services on December 12, 1994, is being lodged with the Clerk. Selected statistics from the survey are reproduced at Appendix A to this brief.

[6] A chart illustrating these trends is reproduced at Appendix B to this brief.

- Similar trends were observed for other drugs, including LSD, cocaine, and amphetamines.

In our view, the extent and serious harms of adolescent drug use would justify a school district's decision to require drug testing of all students. Certainly drug use is at least as harmful and prevalent as the communicable diseases that are the object of mandatory student vaccination programs. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

In this case, the school district's testing program was limited to students participating in extracurricular athletics, in part because of concerns that a broader program might be struck down by the courts. Opp. Cert. at 16; *Acton v. Vernonia School District 47J*, 796 F. Supp. 1354, 1358 (district court opinion). This limitation in scope does not invalidate the school's general interest in preventing drug use among its students or require that the school justify its program solely with regard to some unique interest that pertains only to drug use by athletes. Governments can attempt to solve problems on a step-by-step basis, taking into account such factors as resource limitations, legal risk, and public acceptance. *Cf. Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

With regard to athletes, however, the school district has a number of particular interests in preventing drug use. The health and fitness of students who participate in competitive athletics has traditionally been a matter of oversight by school authorities. Drug use can impair athletic performance and present unique risks to the health of young people who attempt to combine drug use with athletic exertion. For many drugs, levels of use among athletes appear to be similar to those of the student population as a whole. For other drugs, however, use

among athletes is more widespread because of their actual or perceived effect of enhancing athletic performance.[7]

The precise mix of risks sought to be prevented in a drug testing program for athletes will vary somewhat depending upon the drug being tested. Medical authorities document the following concerns about the drugs included in the school district's testing program in this case:

- Marijuana is the most prevalent illegal drug and often serves as a "gateway" to the use of other drugs. It is not ordinarily taken for the purpose of improving athletic performance, although a student could use it in an effort to calm the nerves before a competitive event. The adverse effects of marijuana on athletic performance include the impairment of concentration, psychomotor skills, time perception, and motivation.[8]

- Amphetamines are particularly dangerous to athletes because they are frequently taken to enhance performance by delaying or masking the symptoms of fatigue. However, their use can have a number of long and short term effects on

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[7] *See* Charles Feeney Knapp, Note, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 Iowa L. Rev. 107, 107 nn.3&4, 111-14 (1990), and authorities cited therein (hereinafter "Knapp").

[8] Peter Brukner & Karim Khan, *Clinical Sports Medicine* 681 (1993) (hereinafter "Brukner & Khan"); Jon C. Wagner, *Enhancement of Athletic Performance with Drugs*, *in* 12(4) Sports Medicine 250, 261 (1991) (hereinafter "Wagner"); Robert B. Millman & Ann Bordwine Breeder, *Cannabis*, *in* Galanter & Kleber, at 91-96.

health and fitness. Indeed, part of the impetus for drug testing of athletes came after the deaths of two cyclists in international competition were linked to amphetamine use.[9]

- Cocaine is also a stimulant that can be used to enhance athletic performance, although its effect is more transient than that of amphetamines. Cocaine use can also interfere with athletic performance by impairing eye-hand coordination, sense of time, and inducing inappropriate behavior. The harmful health effects of cocaine are extensive, and its use has been linked to the deaths of a number of well-known athletes.[10]

- LSD has numerous serious adverse effects that would certainly create a serious impairment of athletic performance.[11]

In addition to the particular drugs included in the Vernonia School District program, other drugs can and often are included in testing programs for athletes. Their harmful effects are also documented in the medical literature:

- Anabolic and androgenic steroids are often taken by student athletes to increase muscle mass and

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[9] Brukner & Khan at 672-74; Wagner at 251, 255-56. *See also* Frank H. Gawin, et al., *Stimulants*, *in* Galanter & Kleber, at 111-22.

[10] Brukner & Khan at 674-75; Wagner at 256-57.

[11] J. Thomas Ilngerleider & Robert N. Pechnick, *Hallucinogens*, *in* Galanter & Kleber, at 141-47.

strength. Steroid use is particularly common among weight-lifters and football players. One study found that 6.6 percent of male high school seniors had abused steroids, most of whom participated in sports. The same study found that 20 percent of college athletes abused steroids.[12] Numerous studies have concluded that steroid use can pose serious long-term health risks, although many young athletes are willing to ignore such risks because of competitive pressures and their inability to comprehend long-term consequences. Steroid use can also cause psychological effects such as increased aggressiveness, delusions, schizophrenia and thoughts of suicide.[13] Use of injectable steroids can lead to transmission of the human immunodeficiency virus as a result of needle sharing.[14]

- Alcohol does not enhance athletic performance, although some athletes may believe its use can reduce anxiety before competition or that it provides a good source of carbohydrates in their diet. Alcohol can harm performance by impairing

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[12] U.S. General Accounting Office, *Drug Misuse: Anabolic Steroids and Human Growth Hormone* (August 1989) at 14-17.

[13] *See* Wagner at 257-59; John S. Hallagan, et al., *Anabolic-Androgenic Steroid Use by Athletes*, 321 N. Eng. J. Med. 1042 (1989); Harrison G. Pope & David L. Katz, *Psychiatric and Medical Effects of Anabolic Androgenic Steroid Use*, 51 Arch. Gen. Psych. 375 (1994). *See also*, Knapp, *supra* note 7, at 111-14.

[14] Zili Amsel, et al., *Anabolic Steroid Use Among Male High School Seniors*, 261 J. Am. Med. Ass'n. 2639 (May 12, 1989).

balance, coordination, reaction time and mental functions.[15] The long term health effects of alcohol abuse are well known.

No constitutional objection should be based upon the fact that the Vernonia drug testing program was limited to four substances and did not include steroids or alcohol.[16] As noted above, public authorities are allowed to solve problems on a step-by-step basis. Government action is not unreasonable because it fails to address all other problems that could be described as equally serious. If, as we have contended, the school district could constitutionally require athletes to take drug tests, then the courts should not further burden the adoption of such programs by requiring litigation over the wisdom of each drug that is included or excluded from the testing list. This is the sort of issue that should be addressed by the policymakers responsible for the school district and its athletic program. *See Sitz*, 496 U.S. at 453-54.

However, to the extent justification is required, it should be noted that steroid testing is more complex and expensive than testing for street drugs. Urinalysis testing for drugs such a marijuana and cocaine is quite common

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[15] Wagner at 260.

[16] A district court in the Ninth Circuit had no difficulty in concluding that the court of appeals decision in this case required it to hold unconstitutional a high school athletic drug testing program that did include alcohol and steroids. *Moule v. Paradise Valley Unified School District No. 69*, 863 F. Supp. 1098, 1100, 1103 (D. Ariz. 1994).

and relatively inexpensive.[17] To the extent that an athletic testing program does not include alcohol, it may be because it is not perceived to be as harmful as other drugs or because its current use is readily detected by the odor of alcohol on the breath. Alcohol is also more rapidly metabolized than many other drugs, and thus testing is likely to detect only very recent use.[18]

III. Students Participating In Extracurricular Athletics Have a Reduced Expectation of Privacy

Drug testing programs intrude upon privacy in two ways. First, the collection of urine specimens can involve some compromise of personal modesty, which may vary depending upon the collection protocol. To some extent, the act of urination must be observed or monitored in order to prevent substitution or tampering with a specimen.[19] In this regard, there may be a trade-off between privacy and the effectiveness of testing. The second sense in which drug testing invades privacy is its potential to uncover information about the subject's ingestion of drugs. Of

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[17] *See* Asbjorg Salberg Christopher & Jorg Morland, *Drug Analysis for Control Purposes in Forensic Toxicology, Workplace Testing, Sports Medicine and Related Areas*, 74 J. Pharm. & Toxicol. 202 (1994); Eric Wish & Bernard A. Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, *in* Drugs and Crime 321 (Michael Tonry & James Q. Wilson, eds., 1990) (hereinafter "Wish & Gropper").

[18] *See* Wish & Gropper at 348 (listing duration of detectability for various drugs).

[19] *Id.* at 376.

course, there is little social value in protecting information about the use of illegal or prohibited drugs.[20]

Courts have weighed the seriousness of these intrusions in a variety of ways, and to some extent judges' reactions have seemed idiosyncratic and perhaps exaggerated. Unlike many other kinds of searches, drug tests are very specific in uncovering the particular illegal or prohibited conduct at which they are targeted. Unlike searches of briefcases or offices, they are unlikely to disclose other information that the subject has a legitimate interest in keeping private. Drug testing is also quite common in the private sector, primarily as a condition of employment.[21]

However the courts may view the intrusiveness of drug testing in other contexts, there are good reasons for recognizing that it has a reduced impact on the reasonable

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[20] Some drugs can be used legally pursuant to a doctor's prescription, and thus testing programs may require disclosure of confidential medical information to explain a positive test result. This privacy interest is minimized in the athletic context, where the subject's health and fitness is a legitimate subject of concern. In other contexts, testing programs generally have procedures in place to protect the confidentiality of private medical information that may be provided. *See Skinner* 789 U.S. at 626 n.7; *von Raab*, 489 U.S. at 662 n.1.

[21] The American Management Association has conducted an annual survey of workplace drug testing policies of major corporations since 1987. The survey has shown a steady increase of corporations that have drug testing programs, from 20 percent in 1987 to 87.2 percent in 1994. Perhaps not coincidentally, the percentage of employees and applicants who test positive has also declined steadily over this period. *See* 8 National Report on Substance Abuse, no. 10, at 1 (Apr. 22, 1994).

privacy expectations of members of athletic teams. Athletes have traditionally been subject to a variety of training rules that do not apply to other students, including curfews, mandatory practice sessions, dietary restrictions, and prohibitions of the use of tobacco or alcohol. Perhaps it could be said that an athlete is "seized" when required to attend practice, or "searched" when the coach performs a bed check on an out-of-town trip, but these are routine and accepted practices that would not seem unreasonable under the Fourth Amendment.

The Court can certainly take judicial notice of the fact that athletic locker rooms rarely afford much privacy for showering, changing clothes or restroom use. Athletes' bodies are subject to examination and touching by coaches, trainers, and team doctors. In particular, it is common for students to be required to undergo medical and fitness examinations as a condition of being allowed to participate in sports.[22]

The preparticipation sports examination can certainly be intrusive, requiring the subject to undress in the presence of medical personnel who may or may not be of the same sex. The examination itself may be far more invasive than a requirement to produce a urine specimen. For example, a standard protocol includes manual

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[22] Council on Scientific Affairs, American Medical Association *Ensuring the Health of the Adolescent Athlete*, 2 Arch. Fam. Med. 446 (Apr. 1993). The Council recommended that the preparticipation athletic examination routinely include an assessment of the use of steroids and other drugs, although it did not specifically recommend urinalysis drug testing. *Id.*

examination of the male genitalia to determine the presence of a hernia or undescended testicle.[23]

It should also be noted that urinalysis is often included in the screening examination, which one authority described as a "simple and . . . valuable screening tool to determine the presence of glucose, protein or blood in the urine."[24] Certainly if a student can reasonably be required to provide a urine specimen to test for glucose, protein, or blood, it would not seem unreasonable to test the urine specimen for amphetamines, steroids or other drugs that can pose equal or greater threats to the athlete's health and fitness.

It should also be noted that drug testing is widely practiced in college, amateur and professional sports. The National Collegiate Athletic Association (NCAA) prohibits the use of a variety of drugs by college students participating in intercollegiate athletics and enforces these prohibitions through drug testing.[25] A number of colleges have adopted their own drug testing programs.[26] Although less common at the high school level because of legal and

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[23] John A. Lombardo & John W. Toga, *Preparticipation Screening and Performance Assessment*, *in* Clinical Sports Medicine (William A. Urn & Alexander Kalonak, eds., 1991) at 81-82.

[24] Brukner & Khan at 647.

[25] The California Supreme Court recently rejected a state constitutional challenge to the NCAA testing program at a private university after conducting an analysis based on Fourth Amendment precedents. *Hill v. National Collegiate Athletic Association*, 865 P.2d 633, 657-65 (Cal. 1994).

[26] Knapp, *supra* note 7, at 116-18.

financial issues,[27] the widespread acceptance of this practice in other levels of competition has a bearing on its reasonableness for high school athletes.

IV. Administrative Features of the Drug Testing Program Further Support Its Reasonableness

The drug testing program in this case can readily be characterized as an administrative search. The students are required to consent to testing as a condition of participating in extracurricular athletics. The tests are administered uniformly at the beginning of the season and on a random basis thereafter. The result of a positive test is referral for treatment and/or suspension of participation in athletics. These aspects of the program provide further safeguards and indicia of reasonableness.

Consent, whether implied or actual, has often been viewed as a factor supporting the constitutionality of a search. To be sure, it is often said that the government cannot require citizens to "waive" their constitutional rights in order to receive a government benefit. Yet, whatever may be the utility of the unconstitutional conditions doctrine in other contexts,[28] the Court should recognize that extracurricular athletics are a voluntary activity and there is a reasonable nexus between athletic fitness and drug

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[27] *Id.* at 115-16.

[28] *See* Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 B.U.L. Rev. 593 (1990). For a political process analysis of drug testing and the Fourth Amendment, *see* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 585-89 (1992).

testing. *Cf. Wyman v. James*, 400 U.S. 309 (1971) (reasonable to require home visit by caseworker as a condition for receiving benefits under Aid to Families with Dependent Children program).

The absence of discretion in administering the program is also a factor that has sustained the reasonableness of administrative searches, including the drug testing programs that have been upheld by this Court. *Skinner*, 489 U.S. at 622 & n.6; *von Raab*, 489 U.S. at 667; *Sitz*, 496 U.S. at 453-54. In this case there is no room for arbitrary or discriminatory selection of students for testing, and for that reason there is no reason for a student to feel any stigma about being selected for testing.

Finally, there is no reason to believe that the testing program is an effort to evade the normal constitutional safeguards that apply to criminal law enforcement. The sanctions applied to those who test positive are administrative, not criminal, and are designed to treat and prevent drug abuse rather than to punish.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Date: January 12, 1995

APPENDIX A

Percentage of Students Reporting Drug Use in Previous Year:*

	1991	1992	1993	1994
Any Illicit Drug				
8th grade	11.3	12.9	15.1	18.6
10th grade	21.4	20.4	24.7	30.0
12th grade	29.4	27.1	31.0	35.8
Marijuana				
8th grade	6.2	7.2	9.2	13.0
10th grade	16.5	15.2	19.2	25.2
12th grade	23.9	21.9	26.0	30.7
LSD				
8th grade	1.7	2.1	2.3	2.4
10th grade	3.7	4.0	4.2	5.2
12th grade	5.2	5.6	6.8	6.9
Cocaine				
8th grade	1.1	1.5	1.7	2.1
10th grade	2.2	1.9	2.1	2.8
12th grade	3.5	3.1	3.3	3.6
Stimulants (i.e., amphetamines)				
8th grade	6.2	6.5	7.2	7.9
10th grade	8.2	8.2	9.6	10.2
12th grade	8.2	7.1	8.4	9.4

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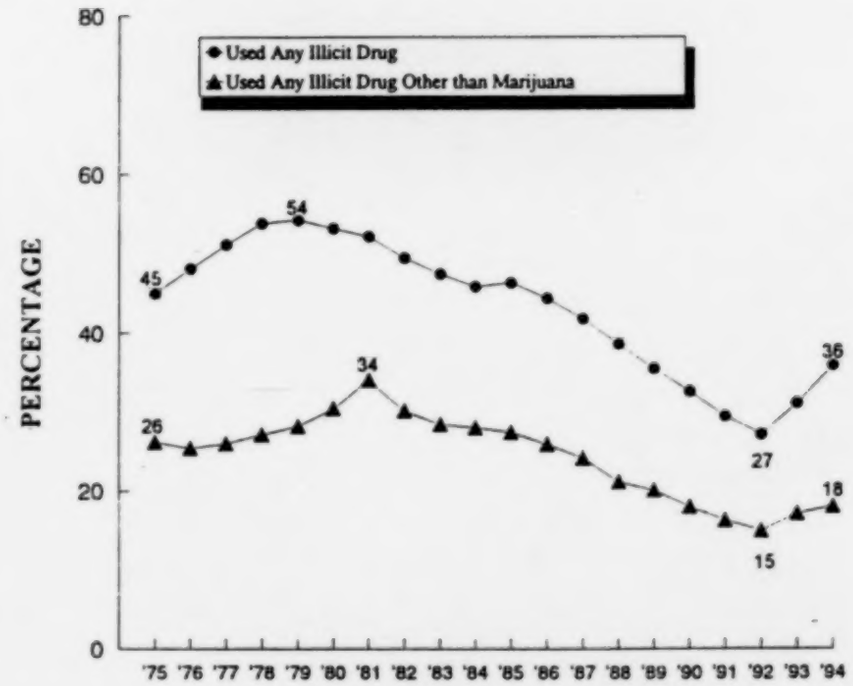
* U.S. Dep't. of Health and Human Services, *Monitoring the Future Study* (Dec. 12, 1994).

APPENDIX B

Trends In An Annual Index of Illicit Drug Use By Twelfth Graders:*



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* U.S. Dep't. of Health and Human Services, *Monitoring the Future Study* (Dec. 12, 1994) (figure 1). "Use of 'any illicit drugs' includes any use of marijuana, hallucinogens, cocaine, and heroin, or any use which is not under a doctor's orders of other opiates, barbituates, methaqualone (excluded since 1990), or tranquilizers." *Id.*

"Beginning in 1982 the question about stimulant use (i.e., amphetamines) was revised to get respondents to exclude the inappropriate reporting of non-prescription stimulants. The prevalence rate dropped slightly as a result of this methodological change." *Id.*